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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF
STEVEN KUHNHAUSEN,

Petitioner.

:
:
: PETITION FOR ADMISSION
:
: TO MEMBERSHIP IN THE
:
: UTAH STATE BAR
:
:
: Case No. 15692
:

BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF STEVEN KUHNHAUSEN,	:	PETITION FOR ADMISSION TO MEMBERSHIP
	:	
Petitioner.	:	IN THE UTAH STATE BAR
	:	
	:	Case No. 15692

BRIEF OF PETITIONER

NATURE OF THE CASE

The Board of Commissioners of the Utah State Bar, after formal hearing, refused to certify to this Court that the petitioner was an individual of good moral character. Petitioner is requesting that this Court review the evidence presented at hearing and exercise its inherent power in matters dealing with the courts of this State and order his admission to the Utah State Bar.

INTRODUCTION

On the 29th of April, 1977, petitioner Steven Kuhnhausen filed his formal application for admission to the Utah State Bar. In July of 1977, the petitioner was required to appear before the Character and Fitness Screening Committee of the Bar. At that meeting, Mr. Kuhnhausen was asked to explain the circumstances of his arrest in 1976. Mr. Kuhnhausen informed the Committee that the arrest had been expunged by court order and it was his understanding of the law that the effect of such an expungement was to permit him to answer all questions regarding the incident as though it had never occurred, or to refrain from answering such inquiries at all. The Committee members acknowledged the existence of the expungement order, but persisted in questioning the petitioner about the underlying events. Mr. Kuhnhausen refused to answer any questions regarding that matter.

The Committee subsequently declined to recommend that Mr. Kuhnhausen be permitted to sit for the Utah State Bar Examination. The petitioner requested a formal hearing on his character and fitness, and asked leave to sit for the examination pending the determination reached at that hearing. This request was granted, and Mr. Kuhnhausen was informed in September of 1977 that he had successfully passed the examination.

On October 21, 1977, a hearing was held on the subject of the petitioner's fitness, with Commissioner W. Eugene Hansen presiding. The petitioner testified on his own behalf and offered the testimony of three members of the Bar with whom he had become acquainted while working as a legal intern with Utah Legal Services. All three expressed the opinion that Mr. Kuhnhausen was possessed of superior abilities and had the high moral qualities necessary to the practice of law. The only evidence offered by the Bar on the subject of the petitioner's moral fitness was embodied in a stipulation agreed to by respective counsel that a Mr. Hedberg, who was called, would testify that in June of 1976 he was in the apartment of the petitioner and on that occasion he observed certain controlled substances in the apartment. This stipulation was agreed to after the hearing officer had denied Mr. Kuhnhausen's motion to exclude such evidence as being violative of his rights under Utah's expungement statute and the court ordered decree of expungement.

On January 6, 1978, the Board of Commissioners of the Utah State Bar entered their findings and conclusions, refusing to certify Mr. Kuhnhausen for membership in the Utah State Bar.

The petitioner is now requesting this Court to review the action taken by the Commission and to admit him to the practice of law in the State of Utah.

ARGUMENT

POINT I. THE REFUSAL OF THE BOARD OF COMMISSIONERS TO CERTIFY THE PETITIONER WAS BASED UPON EVIDENCE OBTAINED IN VIOLATION OF COURT ORDER AND STATUTORY LAW, AND ITS ADMISSION RESULTED IN A DENIAL TO THE PETITIONER OF A FAIR AND IMPARTIAL HEARING.

Utah Code Ann. § 77-35-17.5 (Supp. 1977), provides, in part, that following a petition for expungement:

If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Identification. Thereafter, the arrest, detention, and any further proceedings in that case shall be deemed not to have occurred, and a petitioner may answer accordingly any question relating to their existence.

In the instant case, the petitioner requested such relief, and pursuant to this statute, orders of expungement were duly issued by both the Salt Lake City and Third District Courts prior to the date Mr. Kuhnhausen applied for the Bar. The Bar, however, became advised of the petitioner's arrest record and, with full knowledge of the orders of expungement, obtained copies of Mr. Kuhnhausen's arrest records and court proceedings.

Utah Code Ann. § 77-35-17.5(4) (Supp. 1977), clearly provides under what circumstances access to expunged records is to be permitted:

Inspection of the records shall thereafter be permitted by the Court only upon petition by the person who is the subject of those records and only to the persons named in that petition.

Mr. Kuhnhausen never filed such a petition, on behalf of the Utah State Bar or anyone else. The statute does not provide for dissemination of the expunged records without such a petition, and whether such occurs by mistake, negligence or intentional disobedience to court order, unlawful release of the information contained in those records should not be allowed to violate the protection granted

Since these records should not be allowed to violate the protection granted by the Utah State Bar, the records should not be disseminated to the public. The records are maintained by the Utah State Bar, Library Services and Technology Act, administered by the Utah State Library.

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elsewhere in the statute and subject an individual whose record has been expunged from inquiry from which he would otherwise be immune.

There can be no doubt that the Legislature was fully aware of the broad rights it was creating by passage of the expungement statute, and that they fully intended to insure that individuals who qualified for the protection of the act would no longer be penalized and stigmatized by prior arrest records. The Bar, however, acted in open defiance of this legislative intention by obtaining the petitioner's arrest record and then offering evidence of the arresting officer's observations at the time of arrest. This testimony being the only evidence upon which the Bar based its refusal to certify Mr. Kuhnhausen, the petitioner respectfully submits that this Court should indorse the laudable intent of the legislature and refuse to penalize the petitioner for an arrest which has been judicially expunged, and which by statute is "deemed not to have occurred."

POINT II. THE ACTION OF THE BOARD OF COMMISSIONERS WAS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY THE EVIDENCE PRESENTED AT HEARING.

It is beyond question that when reviewing recommendations of the Board of Commissioners of the Utah State Bar, this Court is not bound by the findings and conclusions of the Commissioners, but retains the ultimate authority to review the facts and make an independent determination. This power stems from the Court's inherent authority to control admission to the practice of law and discipline those admitted. Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); Hild v. Burton, 64 Utah 562, 232 P. 914 (1924).

Past decisions of this Court have recognized that while the recommendations of the Commission should be accorded due consideration, they will not be adopted "unless supported by substantial evidence," In Re MacFarlane, 10 Utah 2d 217,

P. 2d 631, 633 (1960), and will always be disregarded if they appear to have been made arbitrarily, capriciously or unreasonably. In Re Badger, 27 Utah 2d 174, 493 P.2d 1273 (1972). In Re Johnston, 524 P.2d 593 (Utah 1974).

The petitioner respectfully submits that the Commission's conclusion that he "did not establish that he is possessed of good moral character and entitled to the high regard and confidence of the public" is not supported by any substantial evidence in the record, and that the Commission's refusal to certify him for admission to the Bar was arbitrary and unreasonable.

The petitioner is fully aware and acknowledges that an applicant for admission to membership in the Bar bears the burden of establishing his fitness. However, as has been noted by the Supreme Courts of other jurisdictions, once the applicant presents prima facie evidence of his good character it is the obligation of the party opposing his admission to come forward and rebut that evidence, with any reasonable doubt encountered being resolved in favor of the applicant.

In Hallinin v. Committee of Bar Examiners, 421 P.2d 76 (Cal. 1966), the California Supreme Court noted that:

In disciplinary proceedings this court examines and weighs the evidence and passes upon its sufficiency. Any reasonable doubts encountered should be resolved in favor of the accused. These rules are equally applicable to admission proceedings. Id. at 80 (citations omitted)

In Greene v. Committee of Bar Examiners, 4 Cal. 3d 189, 480 P.2d 976 (1971), the Court again expressly held that reasonable doubts as to the good character of an applicant must be resolved in the applicant's favor after he has established a prima facie

showing of good character. For examples of other jurisdictions employing this same standard, see Coleman v. Watts, 81 So.2d 63 (Fla. 1955); Petition of Waters, 447 P.2d 661 (Nev. 1968).

In the instant matter, it is apparent that the Commission applied a much different standard to Mr. Kuhnhausen. Conclusion number six (6) of the Commission states that the applicant "did not remove any and all reasonable suspicion of moral unfitness." The obvious implication being that the applicant was not only given the burden of proof, but was subjected to a presumption of unfitness which could only be overcome with evidence sufficient to remove "all suspicion."

The imposition of such a burden, to clear himself of all and all suspicion, is patently arbitrary and unreasonable. As the court stated in March v. Committee of Bar Examiners, 433 P.2d 13 (Cal. 1967):

the fundamental question to be determined is the same whether the matter at issue relates to an applicant for admission or an attorney upon whom discipline has been imposed: is the petitioner a fit and proper person to be permitted to practice law, and the answer to this usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude.
Id. at 193

The purpose of attorney discipline or refusal to admit applicants to practice is, as this Court has acknowledged, to protect the public from unscrupulous practitioners, and not to impose a penalty upon the attorney or candidate. In Re Badger, supra. When an applicant for admission is forced to dispel all suspicion, the Commission may indulge in with regard to his fitness, and a failure to meet this subjective requirement results in denial of the

practice his chosen profession, many applicants might find themselves penalized for conduct--or even suspected conduct--which in no way bears upon their ability to render able and honest service to the public. Such a formula for admission or denial of the right to follow one's chosen profession is wholly inconsistent with any notion of due process.

In cases involving attorney discipline, this Court has held that "charges should be clearly sustained by convincing proof and a fair preponderance of the evidence." In Re Hanson, 158 P. 778, 779 (Utah 1916). Further, the charges so proved must show the attorney engaged in acts of moral turpitude which reflect upon his ability or willingness to deal with the public honestly and with a high degree of integrity and fidelity. In Re Platz, 42 U. 439, 132 P. 390 (1913).

As has been demonstrated above, once an applicant makes a prima facie showing of his good character, the same standard should be applied in determining if the evidence regarding his actions "clearly sustains by convincing proof" that he is guilty of conduct which is inconsistent with his professional duty; that is, acts of moral turpitude.

This Court addressed itself to the question of what constitutes moral turpitude in In Re Pearce, 136 P.2d 969 (1943), wherein it was acknowledged that :

moral turpitude is adaptive; it is determined by the state of public morals and the common sense of the community. Moral turpitude is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. 136 P.2d at 792. (citations omitted)

It is noteworthy that in addressing itself to the question of whether possession of marijuana was an act involving moral turpitude, the California Supreme Court applied those tests enumerated above to conclude that it was not. In In Re Higbie, 493 P.2d 97 (Cal. 1972), the court held that:

Possession or use of marijuana is, of course, unlawful, but measured by the morals of the day its possession or use does not constitute "an act of baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man," or indicate that an attorney is unable to meet the professional and fiduciary duties of his practice. Id at 103 (citations omitted)

The record in this matter is devoid of any showing that the petitioner lacks the integrity, fidelity or honesty necessary to the practice of law. Indeed, quite the contrary is true as individuals acquainted with Mr. Kuhnhausen both in professional and social roles testified that he was possessed of those attributes and a high degree of legal competence as well. The Commission disregarded this testimony, and based upon an inference entirely extrinsic to the record, concluded that the petitioner had possessed controlled substances with the intent to distribute them. Bar counsel never questioned the petitioner regarding his alleged possession of controlled substances, and there was absolutely no testimony of any kind suggesting any intent to distribute controlled substances.

In addition, there is a complete absence in the record of any suggestion that the conduct which the Bar suspected the petitioner to have engaged in in any way limited Mr. Kuhnhausen's ability or desire to offer effective and trustworthy legal

his willingness to take the attorney's oath and to abide by its tenets and those of the Canons of Ethics. Despite this assertion and the supporting testimony regarding the petitioner's moral fitness, the Commission relied upon a "suspicion" of unfitness to refuse to certify Mr. Kuhnhausen to become a member of the profession for which he had diligently prepared and for which he had already demonstrated his academic competence.

The Nevada Supreme Court has noted that admission to the practice of law is not a matter of grace and favor, but is a right afforded to all who possess the necessary qualifications. Petition of Schaengold, 422 P.2d 686 (1967). The petitioner submits that the denial of this right cannot be premised upon a suspicion of the Commissioners unsupported by any evidence in the record and which can only be rebutted by evidence meeting a standard of proof known to none save those who pass judgment.

The petitioner respectfully submits that the record developed at his hearing justifies his admission to the profession and asks this Court to not adopt the findings and conclusions of the Commission, but rather, to rule favorably on his present petition and order the entry of his name upon the rolls of those admitted to the practice of law in this state.

CONCLUSION

On the basis of an arrest which was judicially expunged prior to Mr. Kuhnhausen's application for admission to the Bar, the petitioner was questioned regarding his moral fitness to become an attorney. The petitioner relied upon the word of the law and declined to answer questions regarding his arrest. The Bar was dissatisfied with this silence, and contrary

to the intent of the expungment statute obtained evidence that the applicant had once possessed controlled substances. A hearing was then held where witnesses testified to Mr. Kuhnhausen's moral fitness and the petitioner himself affirmatively pledged to abide by the oath of the profession and its Canons of Ethics. The Commission was still not satisfied, having a suspicion about the petitioner's moral fitness--a suspicion based entirely upon a single arrest, in which the charges were ultimately dismissed, and the petitioner's assertion of his rights under the law to consider the arrest legally deemed not to have taken place.

The petitioner respectfully submits that the Commission's action in refusing to honor his right under the order of expungement, and in drawing a negative inference from the assertion of that right, was arbitrary and unreasonable. The petitioner further submits that the record developed at his hearing shows him to be an individual of high moral character, and the Commission's conclusion not to certify him on the basis of suspicion of unfitness is totally inconsistent with its duty to abide by the law and render impartial judgments on the basis of the evidence offered, with any reasonable doubts being resolved in favor of the applicant.

The petitioner therefore requests this Court for an order granting him admission to the Utah State Bar.

DATED this 3rd day of April, 1978.


ROBERT D. MOORE
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing document to Pamela T. Greenwood, Attorney for Utah State Bar, 425 East 100 South, Salt Lake City, Utah, 84111, postage prepaid this ____ day of April, 1978.
